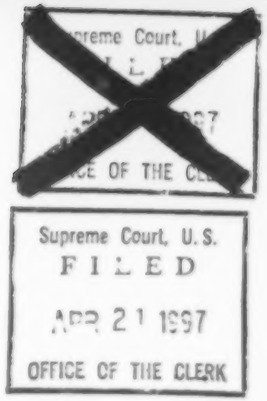
96-8732

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997



No.

VINCENT EDWARDS, KARL V. FORT, REYNOLDS A. WINTERSMITH,
HORACE JOINER, AND JOSEPH TIDWELL
Petitioners,

v.

ORIGINAL

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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April 16, 1997

3 APP (9)

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant found guilty of a dual object narcotics conspiracy, based on a general jury verdict which does not disclose the object of the conspiracy of which the jury found the defendant guilty, must be sentenced on the basis of the criminal objective carrying the lesser penalty or be given a new trial?

2. Whether a defendant may be found guilty of using a firearm during and in relation to the commission of a drug offense when the government failed to elicit evidence from which a jury could find that the firearm was within the defendant's reach and available for immediate use?

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The petitioners, Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner, and Joseph Tidwell respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which was entered in the above-entitled case on January 30, 1997.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entitled United States v. Vincent Edwards, et al., is reported at 105 F.3d 1179 (7th Cir. 1997), and is included in the appendix attached hereto at page A-1.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). On January 30, 1997, the United States Court of Appeals for the Seventh Circuit affirmed the judgments of the district court in the case of United States v. Vincent Edwards, 105 F.3d 1179 (7th Cir. 1997). Petitioners did not seek a petition for rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . . deprived of life, liberty, or property, without due process of law . . . .

The sixth amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed.

STATEMENT OF THE CASE

Issue One (All Petitioners)

The petitioners were all charged with conspiring to possess with intent to distribute controlled substances, cocaine and cocaine base, in violation of Title 21, United States Code, Section 846. (R.357). In addition, petitioners Vincent Edwards, Reynolds Wintersmith, and Joseph Tidwell were each charged with one count of distributing a minute quantity of cocaine base in violation of Title 21, United States Code, Section 841(a)(1). (R.357). Finally, petitioner Joseph Tidwell was charged with using a firearm during and in relation to a narcotics offense in violation of Title 18, United States Code, Section 924(c). (R.357).

The petitioners were indicted in the Northern District of Illinois, Western Division on June

27, 1993 with fifteen other individuals and were charged with conspiring to distribute cocaine base and cocaine. The petitioners were alleged to have been participants in an agreement to sell street quantities of cocaine and cocaine base in the Rockford, Illinois area through the operation of several drug houses. (R.357).

On April 12, 1994, United States District Judge Philip G. Reinhard granted the petitioners' motions for severance and grouped the indicted defendants into three separate trials. (R.711; R.712). The petitioners in this case were grouped together and tried at the second of three trials. The jury returned a verdict of guilty against all of the petitioners on all counts in which they were named. (R. 984 -989).

Count One of the superseding indictment charged the defendants with conspiring to "possess with intent to distribute and to distribute cocaine and cocaine base" in violation of Title 21, United States Code, Section 846. (R. 357). Count One of the superseding indictment thus charged in a single count a conspiracy with two separate criminal objectives: possessing with intent to distribute and to distribute cocaine and possessing with intent to distribute and to distribute cocaine base. The indictment charged the two different objectives in the conjunctive using the term "and" between the two identified narcotic drugs. (R. 357).

The jury returned a general verdict and signed a general verdict form simply finding the defendants guilty "of the offense charged in Count One." (R. 986-995). No special verdict form nor special interrogatory was tendered to the jury (and none was requested by trial counsel for the defendants or for the government) so that it could identify for the Court and the parties which of the two conspiratorial objectives it found each of the defendants to have committed. Thus, there was simply no way of knowing from the general verdict which of the two conspiratorial objectives the jury

found the defendants guilty of in Count One of the indictment.

Considerable testimony at trial focused on the wholesale supply of kilogram quantities of powder cocaine, particularly during the earlier days of the conspiracy prior to the introduction of cocaine base. (Tr. 789-99). Even when the members of the drug conspiracy began to concentrate on the distribution of cocaine base, significant evidence demonstrated that the search for additional sources of wholesale quantities of powder cocaine continued until the end of the conspiracy. (Tr. 851-93). In addition to this wholesale drug operation, the retail operation began exclusively as a powder cocaine operation. It was not until sometime in the summer of 1992 that crack cocaine began to be packaged and distributed in small quantities known as dime bags through the drug conspiracy's distribution organization. (Tr. 871-76). Even while the crack cocaine operation was occurring, the powder distribution continued unabated. (Tr. 925)(selling of "weight" or larger quantities of cocaine). Evidence of the drug seizures by law enforcement officers involved most often powder cocaine and powder cocaine residue; the seizures of crack cocaine were less frequent but nonetheless present. (Tr. 512; 1500; 1530; 1605)(powder cocaine); (Tr. 530; 595; 671)(cocaine base). In light of this evidence, showing both conspiratorial objectives being performed at different times during the charged conspiracy and simultaneously, the jury could have believed that any particular defendant was involved in the powder cocaine conspiracy, the cocaine base conspiracy, or perhaps both.

The court's instructions to the jury did not distinguish between the conspiratorial objectives. The court advised the jury that the defendants were charged with "conspiring to possess with intent to distribute and to distribute cocaine and cocaine base." (Tr. 3032). The court further advised the jury that in order to find the defendants guilty of Count One, the government had to demonstrate beyond a reasonable doubt that "the conspiracy existed and, second, that the defendant knowingly

and intelligently [sic] became a member of the conspiracy," without specifying which conspiracy. (Tr. 3038). Further the court told the jury that any particular defendant "need not join at the beginning or know all the other members or the means by which the [unlawful] purpose was to be accomplished." (Tr. 3039).

With regard to the controlled substance involved, the court told the jury "as a matter of law that cocaine and cocaine base are Schedule II Narcotic Drug Controlled Substances." (Tr. 3040.) Further, the jury was advised that the government need not prove an exact amount of cocaine or cocaine base was involved in the conspiracy but only that the conspiracy involved "measurable amounts of cocaine or cocaine base." (Tr. 3040)(emphasis added). The jury was also advised that the conspiracy charged in Count One, "conspiracy to possess with intent to distribute cocaine and cocaine base" was a drug trafficking crime. (Tr. 3040). No objection was made to these instructions.

Thus, the instructions provided to the jury on the conspiracy charge did not distinguish, either in the definition of conspiracy or in the requirements of the government's proof, the cocaine base conspiracy from the cocaine conspiracy. Moreover, the court repeatedly emphasized that two different drugs were involved and that the jury could convict the defendants of the conspiracy if measurable amounts of either drug were involved since both substances were Schedule II Narcotic Drug Controlled Substances. In light of these instructions, the jury's general verdict of guilty could reflect its finding that the individual defendants solely possessed cocaine with intent to distribute, solely possessed cocaine base with intent to distribute, or did both. Absent a special verdict form or an interrogatory designed to elicit this information, there was simply no method to determine the jury's finding regarding which conspiratorial objective it unanimously found each defendant to have engaged in with at least one other person.

Two of the petitioners, Karl V. Fort and Reynolds A. Wintersmith were sentenced to life imprisonment because the sentencing judge determined that cocaine base was the object of the conspiracy. Petitioner Wintersmith had no criminal history prior to his conviction for this offense. The remaining three petitioners were sentenced to long terms of imprisonment: 28 years, 10 years, and 10 years in the custody of the Bureau of Prisons. Had the sentencing proceeded in accordance with a verdict based on the powder cocaine guidelines, no life sentences without parole could have been imposed, and the sentences of the three other petitioners would have been significantly lower.

Issue Two (Petitioner Joseph Tidwell)

Petitioner Joseph Tidwell was charged with conspiracy to distribute cocaine, a substantive count of possession of cocaine with intent to distribute, and using or carrying a gun during the commission of a drug offense. 18 U.S.C. § 924(c). Tidwell was convicted on all counts. The conviction for using or carrying a gun during the commission of a drug offense is at issue on this petition.

Rockford, Illinois, police officer Thomas Villa testified that he "was on routine patrol" in a housing project when he observed a car "driving through the housing projects without any lights on." Villa activated his Mars light and "attempted to stop the vehicle." "The vehicle did not stop. It continued driving through the housing authority." Villa activated his siren and all of his "emergency lights." The vehicle Villa was following left the housing project. Villa followed it for six or seven blocks during which time it made three turns. (Tr. 2020-2022).

Officer Villa observed the driver "throw a white piece of paper" out of the car. Villa radioed the address where the paper was thrown out. The vehicle was eventually curbed with the assistance of "numerous other ... backup officers." The driver, petitioner Joseph Tidwell, was removed at

gunpoint and Villa "subsequently found a .45 automatic handgun inside the glove compartment of the car." Villa recovered "the white piece of paper, which was a napkin, and inside the napkin was ... rock cocaine" packaged in several little plastic bags. The material in the plastic bags was cocaine. (Tr. 2022-2023, 2024, 2025-2026, 2032, 2047-53).

There was no evidence offered by the Government as to whether the glove compartment in which the gun was found was unlocked or any other evidence which would indicate that the gun was readily accessible. The District Judge instructed the jury, without objection, that to find Tidwell guilty of using or carrying a gun during the course of a drug offense, it would have to conclude that he was involved in the conspiracy or committed the substantive offense and that he "knowingly used or carried a firearm during and in relation to" the conspiracy or the substantive offense. (Tr. 3044). The jury returned its verdict on July 18, 1994. (Tr. 3079).

REASONS FOR GRANTING THE WRIT

Issue One (All Petitioners)

I. The Seventh Circuit's Decision Created a Clear and Irreconcilable Conflict Between Its Decision and that of at Least Five Other Federal Courts of Appeals on the Effect of General Verdicts in Dual or Multiple Object Conspiracies.

The decision of the United States Court of Appeals for the Seventh Circuit in this case is in direct conflict with the decisions of at least five other courts of appeals to consider the precise issue raised in this petition. The conflicting decisions of other circuits reveal that this Court alone can settle the conflict. The Seventh Circuit's decision is also in direct conflict with other courts of appeals on the general resolution of ambiguities of dual object conspiracies not involving narcotics but involving other federal offenses, such as firearms. Finally, the Seventh Circuit's decision impacts an important issue which frequently arises in criminal prosecutions, which, if left to stand, will result in grossly disparate treatment of individuals who have been convicted of identical crimes.

Prior to the Seventh Circuit's ruling in this case, five courts of appeals had confronted the issue raised in the petitioners' case: where a jury returns a general verdict to a charge that a defendant participated in a conspiratorial agreement covering different kinds of drugs or different conspiratorial objectives, and the punishment a defendant may receive varies depending on the jury's precise finding regarding which conspiratorial objective a defendant has agreed to participate in, must a defendant be sentenced on the drug or conspiratorial objective carrying the lesser punishment. All five of these circuits reached the same conclusion: in cases in which an indictment charges multiple conspiratorial objectives, and the jury verdict does not reveal the jury's finding regarding which objective it found beyond a reasonable doubt, the defendant must be sentenced on the objective carrying the lesser punishment or must be afforded a new trial. United States v. Orozco-Prada, 732 F.2d 1076, 1083-84

(2d Cir. 1984); Newman v. United States, 817 F.2d 635 (10th Cir. 1987); United States v. Owens, 904 F.2d 411, 414-15 (8th Cir. 1990); United States v. Bounds, 985 F.2d 188, 194-95 (5th Cir. 1993); United States v. Garcia, 37 F.3d 1359, 1369-71 (9th Cir. 1994).

For example, in United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994), the Ninth Circuit held that a defendant charged and convicted in a single count with a conspiracy to violate Title 21, United States Code, Section 841(a)(1) (possession with intent to distribute) and Section 843 (use of a telephone to further drug conspiracy) had to be sentenced on the basis of the count carrying the lesser punishment. The possession charge carried a maximum penalty of fifteen years imprisonment while the telephone count carried only a four year term. The jury returned a general verdict as to the conspiracy count. The Ninth Circuit concluded there was no way to determine which conspiratorial objective the jury found the defendants had committed by its general verdict of guilty; absent a special verdict form or a special interrogatory, the general verdict of guilty could have supported the lesser charge or the greater charge. Therefore, the district court's sentence of fifteen years could not be supported because it exceeded the permissible punishment of four years for the use of the telephone violation.

Moreover, as the Ninth Circuit noted, "[t]he sentencing court cannot speculate as to which object of the conspiracy the jury found to support the conviction. To do so would invade the province of the jury." Garcia, 37 F.3d at 1370. The Ninth Circuit rested its reasoning on the sixth amendment requirement of a right to trial by jury. Only a jury determination of the conspiratorial objective would satisfy the constitutional requirement. "A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible

for a judge to direct a verdict for the State." Id. at 1370-71 (quoting Carella v. California, 491 U.S. 263, 268 (1989)).

The Seventh Circuit confronted with the identical issue which confronted these other circuits reached the opposite conclusion. The Seventh Circuit held that where a jury returns a general verdict to drug conspiracy charge which names two different conspiratorial objectives -- either different drugs or different drug violations -- there is no need for a special verdict form, a special interrogatory, or any special finding on the part of the jury because determinations regarding amounts and types of controlled substances are sentencing determinations for the judge and not for the jury. Edwards, 105 F.3d at 1180. The Seventh Circuit attempted to distinguish this line of authority by concluding that these decisions did not make a distinction between a conspiracy which alleged a violation of a single crime in two ways from a conspiracy which alleged a violation of two separate crimes. Id. at 1181-82. This distinction, however, has been expressly rejected by this Court and by other circuits in addressing dual object conspiracies based on drug offenses and regarding other federal offenses as well.

The Seventh Circuit's reasoning that the indictment is not ambiguous because it charges one object offense -- the possession with intent to distribute narcotics (cocaine and cocaine base) and a conspiracy to violate a single statutory violation, 21 U.S.C. §841(a)(1)-- and not more than one offense is in direct conflict with the reasoning of this Court's decision in United States v. Griffin, 502 U.S. 46, 49 (1991). In Griffin, the defendants were charged with one offense: conspiring to violate the laws of the United States, in violation of one statutory provision, 18 U.S.C.§ 371, by impairing and impeding a federal agency in the lawful performance of its duties. The conspiracy charged an impairment, however, of two federal agencies: the Drug Enforcement Administration and the Internal

Revenue Service. Yet this Court described this charge as a "multiple-object" conspiracy and went on to address the effect of a general verdict on a multiple object conspiracy. Id. Thus, the distinction the Seventh Circuit attempted to draw between a conspiracy which has as its objects two crimes as opposed to a conspiracy which has as its object violation of a single crime in two ways is inconsistent with the reasoning of Griffin.

Likewise, in United States v. Pace, 981 F.2d 1123, 1129 (10th Cir. 1993), the defendants were charged with a single statutory violation (21 U.S.C. § 846) and a single offense: distribution of methamphetamine and amphetamine. The Tenth Circuit, nonetheless, found the indictment to be a multiple-object conspiracy. The Tenth Circuit very recently reaffirmed its holdings on multiple conspiracies in United States v. Bush, 70 F.3d 557, 562 (10th Cir. 1995). In Bush, the defendant had entered a guilty plea to an indictment which charged the possession with intent to distribute crack (cocaine base) and cocaine. The Court concluded that these allegations raised two different conspiratorial objectives; the plea colloquy was thus subject to the same analysis as was the general jury verdict in its earlier decision in Pace. Id. at 563. Likewise, the First Circuit held in United States v. Melvin, 27 F.3d 710 (1st Cir. 1994), that a dual object conspiracy existed where the indictment charged firearms and machine guns under a single offense, 18 U.S.C. § 924(c). Thus, the reasoning employed by the Seventh Circuit to support its contrary holding, created conflicts with the reasoning in this Court's decision in Griffin and the reasoning of the Tenth and First Circuits in Pace and Melvin.

Only this Court can resolve this Circuit conflict. The Seventh Circuit did not attempt to reconcile the adverse decisions of its sister circuit courts. Nor did it attempt to distinguish the facts of those cases as it had attempted to do just months earlier in its decision in United States v. Banks,

78 F.3d 1190 (7th Cir. 1996). Instead, it recognized the direct conflict between its reasoning and that of the other circuits. The Seventh Circuit then went on to flatly state that the decisions of the majority of courts of appeals to address the precise issue were "wrong." Edwards, 105 F.3d at 1180.

In addition to the Seventh Circuit's recognition of the clear conflict and its certain view that its decision is correct, the Tenth Circuit's reasoning in its contrary view in Pace has been recently reaffirmed in its subsequent view in Bush decided in 1995. Thus, the courts of appeals are not likely to revisit the issue raised by this appeal soon or reverse their respective holdings. The clear conflict will in all likelihood persist unless this Court resolves the conflict one way or the other. Obviously, petitioners believe that the correct view is the one reached by the overwhelming majority of the courts of appeals to have addressed the issue.

In addition to creating a clear circuit conflict on the precise issue of dual object conspiracies in narcotics cases, the Seventh Circuit's reasoning conflicts with the holdings of other circuits in dual object conspiracies where the ambiguity was not simply two different drugs. In United States v. Melvin, 27 F.3d 710, 715 (1st Cir. 1994), the defendants were charged in a single count with a violation of using a firearm during and in relation to a crime of violence (an armed robbery) in violation of 18 U.S.C. § 924(c). The count of the indictment identified six separate firearms which were recovered from the vehicle driven to the robbery, four of which were handguns, and two of which were machine guns. Use of a machine gun during a crime of violence carried a minimum penalty of 30 years imprisonment consecutive to the sentence on the crime of violence while use of the ordinary handguns required the imposition of a five year sentence consecutive to the sentence imposed on the robbery conviction. The sentencing judge could not determine, because no special verdict form had been submitted to the jury, which of the six firearms the jury had determined the

defendants used in relation to the drug trafficking offense. The First Circuit upheld the district court's decision to sentence the defendants to the lesser of the two criminal objectives, imposing a five year consecutive sentence and not the thirty year sentence. Likewise, the Fourth Circuit Court of Appeals, in United States v. Quicksey, 525 F.2d 337, 341 (4th Cir. 1975) held that a special verdict was required where the defendants were charged with conspiracy based on 18, U.S.C. § 371 and conspiracy based on 21, U.S.C. § 846, because the five year maximum under Section 371 was far below the maximum sentence under Section 846.

Finally, the Seventh Circuit's decision creates a circuit conflict as to whether a special verdict form must be given in a dual object conspiracy cases where the punishment may substantially differ depending on the object of the conspiracy for which the defendant is convicted. The Seventh Circuit's decision below specifically noted that special verdict forms or special interrogatories should not be given in dual object conspiracy cases. Edwards, 105 F.3d at 1181. In so ruling, it noted its disagreement with the Eleventh Circuit's "preference" for giving such a special interrogatory or verdict to the jury. United States v. Dennis, 786 F.2d 1029, 1038-41 (11th Cir. 1986). This Court, however, has specially recommended the giving of special verdict forms in dual-objective conspiracy cases. Griffin, 502 U.S. at 61 (Blackmun, J., concurring). Other courts have required such verdict forms in dual object conspiracy cases. E.g., Garcia, 37 F.3d at 1370 ("when the information sought in a special verdict is relevant to the sentence to be imposed, it is the duty of the Government to seek a special verdict")(emphasis added). This conflict can only be resolved by this Court.

This Court should issue the writ of certiorari in this case because the issues raised in the petition are of grave importance. The issues frequently arise and are common in criminal prosecutions. The disparity in sentences based on particular findings of the jury is often quite great

as Congress has increasingly enacted harsher penalties for essentially similar conduct depending on particular variations. The conflict between the lower courts means that persons convicted of the same conduct in different regions in the country will be subjected to vastly different punishments merely because of the disparate interpretation of dual object conspiracies employed by the courts of appeals. Finally, the defendants in this case received significantly harsher sentences than they would otherwise have received had the Seventh Circuit followed the majority of circuits instead of developing its own interpretation of the proper rules in dual object conspiracies.

First, narcotics prosecutions are the single most common federal offense brought by federal prosecutors and heard by the United States District Courts today. Twenty six percent of all federal prosecutions initiated in 1995, the single largest group of any crimes, were for narcotics and dangerous drug offenses. [See Attachment B, at Table 4.7]. Twenty five percent of all cases pending before United States District Courts during 1995 were drug cases. Id. at Table 5.8 The number of court-authorized orders for interception of wire, oral, or electronic communications has continued to increase yearly, with 78.5% of all federal wiretaps being issued for narcotics investigations. (Tables 5.2 and 5.3). These types of investigations most readily are translated into prosecutions based on conspiracy violations, and often involve multiple objects -- either by naming different drugs or by identifying different statutory violations as objects of the conspiracy (such as using the telephone to facilitate a conspiracy 21 U.S.C.§843(b) and possessing with intent to distribute, 21 U.S.C.§841(a)(1)). These substantive statutory violations contain vastly different punishments as do the different illegal controlled substances. The indictment of petitioners in this case followed a court-authorized wiretap on petitioner Karl V. Fort's home telephone and grouped together persons intercepted on the telephone in a single conspiracy charging multiple narcotics. Thus, the federal

district courts and lower appellate courts will continue to confront questions of dual object conspiracies on a frequent and regular basis.

Second, Congress has enacted a statutory framework of punishments in the narcotics field that bases nearly the entirety of a defendant's sentence on the amount and type of drug the for which the defendant is found to be responsible. 21 U.S.C. §841(b). These disparate sentences are replicated in the sentencing guidelines enacted by the United States Sentencing Commission which, of course, are controlling on federal district court judges. U.S.S.G. §2D1. In many of the cases relied upon by the petitioners below, defendants convicted of multiple object conspiracies and sentenced on that objective which carried the higher punishment had their convictions reversed by the reviewing court with instructions that the defendants be afforded a new trial or be sentenced based on the objective carrying the lesser penalty. E.g. Melvin, 27 F.3d at 715; Pace, 981 F.2d at 1129; Garcia, 37 F.3d at 1363. In Melvin, the defendants' sentences of 30 years consecutive to the underlying offense were reduced to five years consecutive based simply on the difference between a penalty established by Congress for handguns as opposed to machineguns. In Pace, the difference between amphetamines and methamphetamine was the difference between at least two levels under the sentencing guidelines and potentially more. In Garcia, the difference between the criminal objectives meant the difference between four years imprisonment and fifteen years. The same potential disparity exists in firearms offenses, which base punishment on differing types of firearms, and in other offenses as well based on particular circumstances. See 18 U.S.C. §924 (a)(1) to (a)(5) (distinguishing punishments based on variety of sentencing factors); 18 U.S.C. §924(c)(1)(basing punishment on distinction between type of weapons used); 18 U.S.C.§1201 (punishment for kidnaping depends on harm to victim).

Third, the Seventh Circuit's decision means that these petitioners, had they committed their

offenses in any other circuit other than the Seventh would have had their sentences substantially reduced because the ratio of punishment under the sentencing guidelines based on quantities of cocaine to quantities of cocaine base are 100 to 1. Certainly for petitioners Karl V. Fort and Reynolds A. Wintersmith, who received life sentences without parole, the impact of the Seventh Circuit's decision could not be more significant. Had the offense been committed in any other circuit, they would not have received a life sentence. Unless this Court resolves the conflict between the circuits on the treatment of dual object conspiracies, these unwarranted and fundamentally unfair disparate sentences will continue to be imposed for conduct which in every respect is identical.

Issue Two (Petitioner Joseph Tidwell)

> II. The Seventh Circuit's decision Affirming the Section 924(c) Conviction was in Contravention of this Court's decision in Bailey v. United States, 116 S.Ct 501 (1995)

This Court's decision in Bailey v. United States, 116 S.Ct. 501 (1995), decided after Petitioner Joseph Tidwell was convicted, changed the criteria for conviction under 18 U.S.C. § 924(c)(1). Bailey's progeny requires the Government to prove the gun was "within the defendant's reach and available for immediate use." United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996); United States v. Baker, 78 F.3d 1241, 1247 (7th Cir. 1996). Tidwell submits that the Government did not and cannot prove that he "carried" the gun unless it establishes that the glove compartment was unlocked.

Tidwell strenuously argued the insufficiency of the evidence on the 924(c)(1) charge in his appeal to the Seventh Circuit. His supplemental authority contended, premised upon United States v. Robinson, 96 F.3d 246, 250 (7th Cir. 1996), that claims regarding the sufficiency of the evidence for a Section 924(c)(1) conviction obtained prior to Bailey , encompass the propriety of the pertinent

jury instruction. Tidwell's reply brief cited United States v. Kim, 65 F.3d 123 (9th Cir. 1995), for the point that a new trial is required where the elements of the crime are changed by an intervening judicial decision. However, the Seventh Circuit affirmed Tidwell's 924(c)(1) conviction without a discussion of any of these points. The opinion notes that "(a)rguments that are variations on contentions made to the panels in (appeals from convictions by severed co-indictees) we reject without additional verbiage. Many others we bypass because they do not affect the sentences." Edwards, 105 F.3d at 1180. However, 924(c)(1) provides for a five year sentence upon conviction which was to run consecutively to the convictions on the conspiracy and possession counts. (Tr. 1/18/95 at 113).

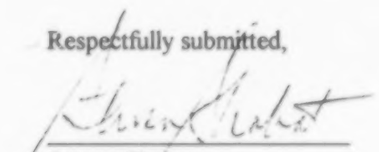
Since there is no discussion in the opinion of these issues, Tidwell cannot determine the basis for the affirmance. The Seventh Circuit has held in at least one post-Bailey case that it will not remand a Section 924(c)(1) conviction for a new trial if the evidence is sufficient for conviction under either the "use" or "carry" prongs of Section 924(c)(1) as interpreted by Bailey. If this was the unspecified reason for the affirmance, it is contrary to United States v. Gaudin, 115 S.Ct. 2310, 2313 (1995), which requires the jury to find all elements of the crime, and is contrary to United States v. Martin Linen Supply Co., 430 U.S. 564 at 572-573 (1977), which prohibits directed verdicts of guilt.

This case justifies Supreme Court review for two reasons: to require the lower courts to grant new trials in pre-Bailey Section 924(c) (1) convictions to enable the Government to prove that the gun was "within the defendant's reach and available for immediate use" and to hold that a new trial is required whenever the elements of a crime are changed by an intervening judicial decision and a court cannot take it upon itself to conclude that a properly instructed jury in such instances would render a guilty verdict.

CONCLUSION

For the reasons noted herein, Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on January 30, 1997.

Respectfully submitted,



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APPENDIX: ITEM A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Vincent EDWARDS, Reynolds A. Wintersmith, Horace Joiner, Karl V. Fort, and Joseph Tidwell, Defendants-Appellants.

Nos. 94-3805, 94-3833, 94-3952, 94-3953, 95-1358.

United States Court of Appeals, Seventh Circuit.

Argued Dec. 2, 1996.

Decided Jan. 30, 1997.

Defendants were convicted in the United States District Court for the Northern District of Illinois, Philip G. Reinhard, J., of conspiracy to distribute cocaine or cocaine base, and they appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that although general jury verdict did not specify whether defendants conspired to distribute cocaine or cocaine base, judge was not required to sentence defendants on assumption that all the drug had been powder cocaine.

Affirmed.

1. Criminal Law ⇐749, 992

Although general jury verdict did not specify whether defendants conspired to distribute cocaine or cocaine base, judge was not required to sentence defendants on assumption that all the drug had been powder cocaine; under Sentencing Guidelines, judge alone determined which drug was distributed, and in what quantity. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. §§ 1B1.2(d), 1B1.2, comment. (n.5), 1B1.3, 18 U.S.C.A.

2. Drugs and Narcotics ⇐133

Judge may base sentence on kinds and quantities of drugs that were not considered by jury. U.S.S.G. § 1B1.3, 18 U.S.C.A.

3. Criminal Law ⇐1211

Because sentencing depends on proof by preponderance of evidence, while conviction depends on proof beyond reasonable doubt, judge may base sentence on events underlying charges for which jury returned verdict of acquittal. U.S.S.G. § 1B1.3, 18 U.S.C.A.

Barry Rand Elden, Chief of Appeals, Office of the United States Attorney, Criminal Appellate Division, Chicago, IL, Elizabeth Collery (argued), Department of Justice, Criminal Division, Washington, DC, for U.S. in Nos. 94-3805 and 94-3833.

J. Michael McGuinness (argued), Chicago, IL, for Vincent Edwards.

Mark D. DeBofsky, Steven Shobat (argued), Mark D. DeBofsky, Richard Q. Holloway, Debofsky & Debofsky, Chicago, IL, for Reynolds A. Wintersmith.

James T. Zuba, Keith C. Syfert, Office of the United States Attorney, Rockford, IL, Elizabeth Collery (argued), Department of Justice, Criminal Division, Washington, DC, for U.S. in No. 94-3952.

Donald P. Sullivan (argued), Canfield, Canfield & Sullivan, Rockford, IL, for Horace Joiner.

Barry Rand Elden, Chief of Appeals, Office of the United States Attorney, Criminal Appellate Division, Chicago, IL, John G. McKenzie, Office of the United States Attorney, Rockford, IL, Elizabeth Collery (argued), Department of Justice, Criminal Division, Washington, DC, for U.S. in No. 94-3953.

Steven Shobat (argued), Chicago, IL, for Karl V. Fort.

Barry Rand Elden, Chief of Appeals, Office of the United States Attorney, Criminal Appellate Division, Chicago, IL, John G. McKenzie, Keith C. Syfert, Office of the United States Attorney, Rockford, IL, Elizabeth Collery (argued), Department of Justice, Criminal Division, Washington, DC, for U.S. in No. 95-1358.

Robert A. Handelsman (argued), Chicago, IL, for Joseph Tidwell.

Before CUMMINGS, EASTERBROOK, and ROVNER, Circuit Judges.

EASTERBROOK, Circuit Judge.

An indictment charged that 20 persons, affiliated with the Gangster Disciples street gang, distributed cocaine in and near Rockford, Illinois. The leaders of this ring called themselves "The Mob". Five pleaded guilty; the remaining 15 were tried in three groups. Other panels of this court have affirmed the convictions and sentences resulting from two of these trials. *United States v. Evans*, 92 F.3d 540 (7th Cir.1996); *United States v. Russell*, Nos. 94-4000 *et al.*, 1996 WL 508598 (7th Cir. Aug. 30, 1996) (unpublished order). After their convictions in the remaining trial, Karl V. Fort and Reynolds Wintersmith were sentenced to life in prison, Joseph Tidwell to 312 months, Horace Joiner to 126 months, and Vincent Edwards to 120 months. Arguments that are variations on contentions made to the panels in *Evans* and *Russell* we reject without additional verbiage. Many others we bypass because they do not affect the sentences. Precise calculations of drug quantity do not matter when the amounts are as large as they are here. Only one contention requires discussion: defendants' joint argument that the judge must sentence them as if all of the cocaine were cocaine hydrochloride (powder), because the jury's verdict does not unambiguously establish that they peddled any cocaine base (crack).

Count I of the indictment charged the defendants with conspiring to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The instructions told the jury that it could convict the defendants under Count I if it concluded that the conspiracy "involved measurable amounts of cocaine or cocaine base." The jury returned a verdict of guilty—which means, appellants insist, that the verdict does not establish that they distributed any crack, for the jury would have returned the same verdict had all of the drug been powder cocaine. Because, on this understanding, "there is simply no way of determining from the general verdict which of the conspiratorial objectives the jury found beyond a reasonable doubt" (Appellants' Joint Br. 33), appellants ask us to require the prosecutor to elect between a new trial and resentencing on the assumption that all of the cocaine was powder. Defendants did not object to this part of the instructions or the verdict form, and they did not ask the court to elicit from the jury the information they now say is missing, so they argue now that the district court committed plain error. See *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Five courts of appeals have held that, when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendants must be sentenced as if the organization distributed only the drug carrying the lower penalty. *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir.1984); *Newman v. United States*, 817 F.2d 635 (10th Cir.1987); *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir.1990); *United States v. Bounds*, 985 F.2d 188, 194-95 (5th Cir.1993); *United States v. Garcia*, 37 F.3d 1359, 1369-71 (9th Cir.1994). *Newman* held that the shortcoming it identified is "plain error." 817 F.2d at 637 n. 3; see also *United States v. Pace*, 981 F.2d 1123, 1128 (10th Cir.1992). We believe that all of these decisions are wrong. There was no error, and hence no plain error, in this case.

[1-3] Our reason is simple: under the Sentencing Guidelines, the judge alone determines which drug was distributed, and in what quantity. *Witte v. United States*, —— U.S. ——, ——, 115 S.Ct. 2199, 2207-08, 132 L.Ed.2d 351 (1995); *United States v. Cooper*, 39 F.3d 167, 172 (7th Cir.1994); *United States v. Levy*, 955 F.2d 1098, 1106 (7th Cir.1992); U.S.S.G. § 1B1.2(d) & Application Note 5. The "relevant conduct" rule requires the judge to consider drugs that were part of the same plan or course of conduct, whether or not they were specified in the indictment. U.S.S.G. § 1B1.3; *United States v. Watts*, —— U.S. ——, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); *United States v. White*, 888 F.2d 490 (7th Cir.1989); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 8-12, 25-28 (1988). A judge therefore may base a sentence on kinds and quantities of drugs that were not considered by the jury. *United States v. Garcia*, 69 F.3d 810, 818-19 (7th Cir.1995);

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nited States v. Rounds, 985
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United States v. Montgomery, 14 F.3d 1189, 1196–98 (7th Cir.1994); *United States v. Villarreal*, 977 F.2d 1077, 1080 (7th Cir.1992). Because sentencing depends on proof by a preponderance of the evidence, while conviction depends on proof beyond a reasonable doubt, the judge may even base a sentence on events underlying charges for which the jury returned a verdict of acquittal. *Watts, supra*. What a jury believes about which drug the conspirators distributed therefore is not conclusive—and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options.

Orozco-Prada, first in the line of contrary decisions, relied on a series of cases that address a different problem. Suppose the indictment charges that the defendants conspired to commit two crimes—say, bank robbery and money laundering—that have different maximum punishments. Because the punishment for conspiracy depends on the punishment for the substantive offense, 18 U.S.C. § 371; 21 U.S.C. § 846, a disjunctive verdict form (or a disjunctively phrased indictment) leaves unresolved the question whether the conspirators pursued both objectives and, if only one, which. The judge does not have authority to sentence the defendants to 20 years (the bank robbery maximum) if they conspired only to launder the proceeds of someone else's robbery. So unless the prosecutor consents to a sentence based on the lower maximum punishment, there must be a new trial. See *Brown v. United States*, 299 F.2d 438 (D.C.Cir.1962) (Burger, J.), among the several similar cases cited by *Orozco-Prada*, 732 F.2d at 1083–84. *Brown* and its successors reach an entirely sensible result but have nothing to do with an indictment that charges the defendants with agreeing to commit *one crime* in *two ways*. Powder and crack cocaine are variations of the same drug sold to distinct segments of the retail market; the difference has consequences for sentencing under 21 U.S.C. § 841(b) and the Guidelines, but not for the identification of the substantive offense. Cf. *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); *Neal v. United States*, — U.S. ——, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996). Section 841(a)(1) makes it unlawful "to manufacture, distribute, or dispense, or to possess with intent to manufacture, distribute or dispense, a controlled substance". That is the crime these five defendants conspired to commit. Application of the disparate sentencing rules for different types and quantities of controlled substances is for the judge rather than the jury. This is why it is unnecessary for the indictment to charge how much of a drug was involved, even though quantity matters greatly to the sentence. An indictment could charge the defendants with "conspiring to distribute controlled substances in violation of 21 U.S.C. § 841(a)" without identifying either the substances or the quantities. Defendants might well prefer this form of charge, if the alternative is multiple conspiracies for multiple drugs, with cumulative punishments. Cf. *United States v. Duff*, 76 F.3d 122 (7th Cir. 1996). If the grand jury specifies details, the proof and the jury charge may not depart from them in a way that constructively amends the indictment. Compare *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), with *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). See also *United States v. Leichtnam*, 948 F.2d 370, 378–81 (7th Cir. 1991). But the indictment here identified both powder and crack; defendants do not argue variance.

Orozco-Prada did not mention the difference between conspiracy to commit two crimes, and conspiracy to commit one crime in two ways. It therefore applied the *Brown* principle uncritically. *Newman* relied on both *Brown* and *Orozco-Prada*, again without making the distinction. Neither *Orozco-Prada* nor *Newman* mentioned the difference between the jury's and the judge's roles. *Newman* even concluded that "the uncertainty taints the conviction itself" (817 F.2d at 639) and remanded for a new trial—a position since disapproved by *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), and inconsistent with our conclusion in *United States v. Peters*, 617 F.2d 503 (7th Cir.1980), which the tenth circuit declined to follow, 817 F.2d at 638. Finally, *Owens*, *Rounds*, and *Garcia* relied on *Orozco-Prada* and *Newman* without independent analysis.

In *United States v. Banks*, 78 F.3d 1190, 1201–04 (7th Cir.1996), we held (following *Peters*) that there is no problem when the instructions are phrased in the conjunctive, for then the jury necessarily finds that the defendants distributed all of the drugs identified in the indictment. Now we add that there is no problem when the instructions are phrased in the disjunctive, because (subject to the variance possibility discussed above) as long as the jury finds that the defendants conspired to distribute *any* drug proscribed by § 841(a)(1), the judge possesses the power to determine which drug, and how much. Our conclusion has the support of holdings in the eleventh circuit, see *United States v. Williams*, 876 F.2d 1521, 1525 (11th Cir.1989); *United States v. Dennis*, 786 F.2d 1029, 1038–41 (11th Cir.1986), although not of all the language in these opinions. *Dennis* expressed a preference for obtaining a special verdict from the jury—and even so was disapproved by *Newman* for holding that the judge could make an independent decision about the type and quantity of drugs involved—but we see no reason to put an extra question to the jurors, whose tasks are complex enough when trying to address the questions that the law commits to them. *Williams* could perhaps be distinguished on the ground that it involved a request for a lesser-included-offense instruction, but its holding—that the defendant is not entitled to this instruction, because distributing powder cocaine cannot be a lesser included offense of distributing cocaine base when the two are the *same* offense—establishes the same principle on which we rely. Whether the conspiracy deals different drugs or different forms of the same drug is not pertinent. A charge that the conspirators agreed to distribute marijuana, cocaine, and heroin identifies only a single crime—for the conspiracy is the *agreement* and not the distribution, see *United States v. Shabani*, 513 U.S. 10, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994)—and the judge is free to determine after the verdict which penalty is appropriate in light of the types and quantities of drugs handled. A conflict among the circuits was apparent after the tenth circuit's disapproval, in *Newman*, of decisions from the seventh (*Peters*) and eleventh (*Dennis*), and may well have been implicit in our decisions about the allocation of authority between judge and jury. But because our decision makes the scope of the conflict so clear, we have circulated this opinion to all active judges under Circuit Rule 40(e). A majority did not favor a hearing en banc. Circuit Judge Ripple voted in favor of hearing this case en banc.

AFFIRMED.

Aaron D. WEINBERGER, as administrator of the Estate of Jeremiah Benjamin Weinberger, Aaron David Weinberger, as father of Jeremiah Benjamin Weinberger, Plaintiff–Appellant,

v.

STATE OF WISCONSIN, Donna Chester, Probation Officer and as yet unnamed probation officers and employees, Defendants–Appellees.

No. 95–3398.

United States Court of Appeals, Seventh Circuit.

Argued April 18, 1996.

Decided Jan. 31, 1997.

Parent of victim of cannibalistic serial killer brought § 1983 civil rights action and state claim against killer's probation officer, alleging that officer's failure to conduct home visit caused victim's death. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, 906 F.Supp. 485, granted summary judgment for defendant. Plaintiff appealed. The Court of Appeals, Ripple, Circuit Judge, held that: (1) defendant was not reckless, and so was not liable in civil rights action, and (2) plaintiff failed to file timely notice of claim

APPENDIX: ITEM B

Table 4.7

Arrests

By offense charged and age, United States, 1994

(10,654 agencies; 1994 estimated population 207,624,000)

Offense charged	Total all ages	Ages under 15	Ages under 18	Ages 18 and older	Under 10	10 to 12	13 to 14	15	16	17	18	19
Total	11,877,188	780,979	2,209,675	9,667,513	37,130	176,289	567,560	428,697	489,089	510,640	520,831	505,122
Percent[a]	100.0%	6.6	18.6	81.4	0.3	1.5	4.8	3.6	4.1	4.3	4.4	4.3
Murder and nonnegligent manslaughter	18,497	379	3,102	15,395	3	31	345	535	912	1,276	1,418	1,418
Forcible rape	29,791	1,863	4,859	24,932	103	442	1,318	892	993	1,111	1,217	1,158
Robbery	146,979	13,543	47,094	99,885	245	2,478	10,820	10,008	11,753	11,790	10,653	8,701
Aggravated assault	449,716	23,190	70,030	379,686	1,043	5,261	16,886	13,219	15,993	17,628	17,857	17,030
Burglary	319,926	47,481	115,681	204,245	3,135	11,833	32,513	22,232	23,413	22,555	20,223	15,889
Larceny-theft	1,236,311	185,611	412,349	823,962	9,145	51,765	124,901	76,459	77,418	72,661	62,806	49,702
Motor vehicle theft	166,260	21,867	73,265	92,995	206	2,592	19,069	17,986	18,087	15,325	11,698	8,718
Arson	16,764	6,289	9,268	7,496	1,153	2,041	3,095	1,224	964	791	531	488
Violent crime[b]	644,983	38,975	125,085	519,898	1,394	8,212	29,369	24,654	29,651	31,805	31,145	28,307
Percent[a]	100.0%	6.0	19.4	80.6	0.2	1.3	4.6	3.8	4.6	4.9	4.8	4.4
Property crime[c]	1,739,261	261,448	610,563	1,128,698	13,639	68,231	179,578	117,901	119,882	111,332	95,258	74,797
Percent[a]	100.0%	15.0	35.1	64.9	0.8	3.9	10.3	6.8	6.9	6.4	5.5	4.3
Total Crime Index[d]	2,384,244	300,423	735,648	1,648,596	15,033	76,443	208,947	142,555	149,533	143,137	126,403	103,104
Percent[a]	100.0%	12.6	30.9	69.1	0.6	3.2	8.8	6.0	6.3	6.0	5.3	4.3
Other assaults	991,881	72,514	171,642	820,239	3,731	18,961	49,822	32,005	33,602	33,521	31,173	31,652
Forgery and counterfeiting	93,003	927	7,013	85,990	33	184	710	981	2,057	3,048	4,199	4,512
Fraud	330,752	4,409	18,594	312,158	127	657	3,625	4,082	4,120	5,983	8,969	11,896
Embezzlement	11,614	92	803	10,811	8	22	62	60	211	440	574	631
Stolen property; buying, receiving, possessing	134,930	10,751	36,218	98,712	240	1,890	8,621	7,376	8,714	9,377	9,690	8,078
Vandalism	259,579	60,250	122,085	137,494	6,074	17,782	36,394	21,415	21,381	19,039	13,965	11,017
Weapons; carrying, possessing, etc.	213,494	16,661	52,200	161,294	611	3,424	12,626	9,963	12,199	13,337	14,213	12,554
Prostitution and commercialized vice	86,618	120	1,013	85,805	10	18	92	129	289	475	1,317	1,900
Sex offenses (except forcible rape and prostitution)	81,887	7,506	14,418	67,469	658	2,081	4,767	2,442	2,230	2,240	2,205	2,183
Drug abuse violations	1,118,346	21,830	131,220	987,126	266	2,281	19,283	24,103	36,747	48,540	60,142	57,756
Gambling	15,845	242	1,493	14,352	2	24	216	299	423	529	531	537
Offenses against family and children	92,133	1,475	4,234	87,899	98	293	1,084	915	978	966	2,009	2,207
Driving under the influence	1,079,533	329	10,573	1,068,960	117	24	186	534	2,708	7,002	15,769	22,312
Liquor laws	424,452	10,083	94,030	330,422	153	832	9,098	14,001	27,520	42,426	60,029	59,868
Drunkenness	571,420	2,065	14,778	556,642	120	197	1,748	2,298	3,606	6,809	12,831	14,090
Disorderly conduct	601,002	48,868	137,328	463,674	1,741	10,752	36,375	27,057	30,178	31,225	30,639	27,148
Vagrancy	21,413	925	3,657	17,756	19	154	752	773	946	1,013	1,072	960
All other offenses (except traffic)	3,046,100	99,318	343,669	2,702,431	5,396	20,348	73,574	61,382	81,918	101,051	124,694	132,388
Suspicion	11,395	551	1,712	9,683	39	128	384	396	385	380	407	399
Curfew and loitering law violations	105,888	31,609	105,888	X	537	4,552	26,520	24,667	28,098	21,514	X	X
Runaways	201,459	90,031	201,459	X	2,117	15,242	72,672	51,634	41,246	18,548	X	X

Note: See Note, table 4.1. This table presents data from all law enforcement agencies submitting complete reports for 12 months in 1994 (Source, p. 381). Population figures represent U.S. Bureau of the Census July 1, 1994 estimates. For definitions of offenses, see Appendix 3.

[a]Because of rounding, percents may not add to total.
[b]Violent crimes are offenses of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault.
[c]Property crimes are offenses of burglary, larceny-theft, motor vehicle theft, and arson.
[d]Includes arson.

Source: U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 1994* (Washington, DC: USGPO, 1995), pp. 227, 228.

Table 5.7

Criminal cases filed, terminated, and pending in U.S. District Courts

1955-95

	Pending at beginning of report-ing period	Total filed		Total terminated	Pending at end of report-ing period
		Original proceedings[a]	Received by transfer		
1955	10,100	35,310	1,813	38,580	8,643
1956	8,643	28,739	1,914	32,053	7,243
1957	7,243	28,120	1,958	29,626	7,495
1958	7,495	28,897	1,840	30,781	7,451
1959	7,451	28,729	1,924	30,377	7,727
1960	7,727	28,137	1,691	29,864	7,691
1961	7,691	28,460	1,808	29,881	8,078
1962	8,078	29,274	1,743	30,013	9,082
1963	9,082	29,958	1,888	31,546	9,282
1964	9,282	29,944	1,789	31,437	9,578
1965	9,578	31,569	1,765	32,078	10,834
1966	10,834	29,729	1,765	30,644	11,684
1967	11,684	30,534	1,673	30,350	13,541
1968	13,541	30,714	1,857	31,348	14,763
1969	14,763	33,585	1,828	32,406	17,770
1970	17,770	38,102	1,857	36,819	20,910
1971	20,910	41,290	1,867	39,582	24,485
1972	24,485	47,043	2,011	48,101	25,438
1973	25,438	40,387	2,087	43,456	24,416
1974	24,416	37,667	2,087	41,526	22,644
1975	22,644	41,108	2,174	43,515	22,411
1976	22,411	39,147	1,911	43,675	19,794
1977	19,794	40,000	1,589	44,233	17,150
1978	17,150	34,624	1,259	37,286	15,847
1979	15,847	31,536	1,152	33,411	15,124
1980	15,124	27,910	1,022	29,297	14,759
1981	14,759	30,353	975	30,221	15,866
1982	15,866	31,623	1,059	31,889	16,659
1983	16,659	34,681	1,191	33,985	18,546
1984	18,587	35,911	934	35,494	19,938
1985	19,938	38,546	954	37,139	22,299
1986	22,299	40,427	1,063	39,333	24,456
1987	24,453	42,156	1,136	42,287	25,458
1988	25,263	43,503	1,082	42,115	27,733
1989	27,722	44,891	1,104	42,810	30,907
1990	30,910	47,862	942	44,295	35,519
1991	35,021	45,055	880	42,786	37,968
1992	39,562	47,472	894	44,147	43,781
1993	34,078	45,903	883	44,900	36,084
1994	28,701	44,667	606	45,129	29,045
1995	26,326	45,053	735	41,527	30,589

Note: There were two reporting changes during fiscal year 1976 that have affected the data base. Beginning Oct. 1, 1975, all minor offenses (offenses involving penalties that do not exceed 1 year imprisonment or a fine of more than $1,000), with the exception of most petty offenses (offenses involving penalties that do not exceed 6 months incarceration and/or a fine of not more than $500), are included. Minor offenses are generally disposed of by the magistrates and, in past years, most of these minor offenses would not have been counted in the workload of the district courts. Second, when the Federal Government's motion to dismiss an original indictment or information is granted, the superseding indictment or information does not become a new case as in the years prior to 1976, but remains the same case. (An indictment is the charging document of the grand jury, and an information is the charging document of the U.S. attorney.) Data for 1955-91 are reported for the 12-month period ending June 30. Beginning in 1992, data are reported for the Federal fiscal year, which is the 12-month period ending September 30. These data were taken from the first year they were reported and do not reflect revisions made in subsequent years. Therefore, these data may differ from figures presented in table 5.8.

"Received by transfer" includes defendants transferred by Rule 20, ***Federal Rules of Criminal Procedure***, which provides that defendants who (1) are arrested or held in a district other than that in which an indictment or information is pending against them or in which the warrant for their arrest was issued and (2) state in writing that they wish to plead guilty or nolo contendere, may consent to disposition of the case in the district in which they are arrested or are held, subject to the approval of the U.S. attorney for both districts.

[a]Includes reopens.

Source: Administrative Office of the United States Courts, ***Annual Report of the Director, 1981***, p. 94; ***1983***, pp. 302, 303; ***1985***, pp. 336, 337; ***1986***, pp. 232, 233; ***1995***, pp. 195, 196 (Washington, DC: Administrative Office of the United States Courts); and Administrative Office of the United States Courts, ***Annual Report of the Director, 1982***, pp. 272, 273; ***1984***, pp. 310, 311; ***1987***, pp. 238, 239; ***1988***, pp. 241, 242; ***1989***, pp. 239, 240; ***1990***, pp. 176, 177; ***1991***, pp. 230, 231; ***1992***, pp. 232, 233; ***1993***, pp. AI111, AI112; ***1994***, Table D-1 (Washington, DC: USGPO). Table constructed by SOURCEBOOK staff.

Table 5.8

Criminal cases filed in U.S. District Courts

By offense, fiscal years 1993, 1994, and 1995

Offense	1993	1994	1995
Total	45,903	44,678	45,053
Miscellaneous general offenses	11,838	12,414	11,113
Drunk driving and traffic	6,229	7,079	5,214
Weapons and firearms	3,636	3,113	3,620
Escape[1]	725	739	687
Kidnaping	67	68	91
Bribery	205	283	190
Extortion, racketeering, and threats	491	509	713
Gambling and lottery	75	80	28
Perjury	111	93	95
Other	299	450	487
Fraud	7,575	7,089	7,416
Drug laws	12,239	11,362	11,520
Narcotics	6,318	5,177	NA
Marijuana	3,756	3,655	NA
Controlled substances	2,088	2,425	NA
Other drug statutes	77	99	NA
Larceny and theft	3,322	3,336	3,432
Forgery and counterfeiting	1,059	1,093	1,001
Embezzlement	1,857	1,576	1,368
Immigration laws	2,487	2,596	3,960
Federal statutes	2,200	2,090	2,402
Agricultural/conservation acts	254	251	401
Migratory bird laws	27	39	27
Civil rights[2]	62	70	73
Motor Carrier Act	20	11	12
Antitrust violations	71	43	38
Food and Drug Act	67	46	53
Contempt	56	74	69
National defense laws	144	95	83
Customs laws	69	86	97
Postal laws	212	182	202
Other	1,218	1,191	1,343
Robbery	1,789	1,520	1,240
Bank	1,714	1,468	1,168
Postal	51	35	43
Other	24	17	29
Assault	523	562	561
Auto theft	349	338	267
Burglary	141	139	63
Homicide	181	195	295
Sex offenses	337	359	412
Liquor, internal Revenue	8	2	3

Note: See Note, table 5.7. Some data for 1994 have been revised by the Source and will differ from previous editions of SOURCEBOOK.

[1]Includes escape from custody; aiding or abetting an escape; failure to appear in court; and bail jumping.

[2]Includes cases removed from State courts under provisions of the Civil Rights Act, Title 28 U.S.C. Section 1443.

Source: Administrative Office of the United States Courts, ***Annual Report of the Director, 1995*** (Washington, DC: Administrative Office of the United States Courts, 1996), pp. 207-209. Table adapted by SOURCEBOOK staff.

Table 5.1

Requests for immunity by Federal prosecutors to the U.S. Attorney General and witnesses involved in these requests

By origin of request, fiscal years 1973-95

Fiscal year	Requests			Witnesses		
	Total number	Criminal Division		Total number	Criminal Division	
		Number	Percent		Number	Percent
1973	1,180	789	68%	2,710	1,598	59%
1974	1,410	1,121	80	3,856	2,065	56
1975	1,630	1,259	77	3,733	2,183	59
1976	1,780	1,361	76	3,823	2,364	62
1977	1,798	1,250	70	4,413	1,986	45
1978	1,445	950	66	2,997	1,403	47
1979	1,596	1,163	73	3,204	1,816	57
1980	1,653	1,207	73	3,530	1,980	54
1981	1,668	1,252	74	3,271	2,032	62
1982	1,836	1,394	76	3,810	2,233	59
1983	1,986	1,423	72	4,238	2,243	53
1984	2,378	1,838	77	4,784	2,858	60
1985	2,451	1,899	77	5,146	3,339	65
1986	2,530	1,948	76	5,013	3,267	65
1987	2,369	1,860	79	4,603	3,249	71
1988	2,366	1,821	77	4,702	3,205	68
1989	2,301	1,807	79	4,495	3,245	72
1990	2,049	1,694	83	3,735	2,905	78
1991	1,963	1,561	80	3,377	2,449	73
1992	1,819	1,417	78	3,240	2,309	71
1993	1,959	1,466	75	3,521	2,383	68
1994	1,717	1,282	74	3,279	2,225	68
1995	1,519	1,191	78	2,775	1,998	72

Note: These data reflect requests received from Federal prosecutors under 18 U.S.C. 6001-6005, the statute that now governs the granting of use immunity. 18 U.S.C. 6003 requires all Federal prosecuting attorneys to receive authorization from the U.S. Attorney General (or representative) before seeking a court order for witness immunity. It should be noted that in some cases in which the authorization is obtained, the prosecutor may decide not to seek the immunity order from the courts. Therefore, the number of witnesses actually granted immunity is probably lower than the data in the table indicate. It should also be noted that data for 1973 and 1974 include a total of 11 requests and 27 witnesses, and 7 requests and witnesses, respectively, falling under an older statute, 18 U.S.C. 2514, which has since been repealed. "Criminal Division" refers to the Criminal Division of the U.S. Department of Justice and the U.S. attorneys. Other requests, not pertaining to the Criminal Division, come from the remaining divisions of the U.S. Department of Justice (e.g., Antitrust, Tax, Civil Division, Civil Rights, and Lands and Natural Resources), as well as from the other Federal agencies (e.g., Interstate Commerce Commission, Federal Trade Commission, Securities and Exchange Commission, and Department of the Army) and from Congress, all of which may request immunity for witnesses. Data for fiscal years 1987-93 have been revised by the Source and may differ from previous editions of SOURCEBOOK.

Source: Table constructed by SOURCEBOOK staff from data provided by the U.S. Department of Justice, Criminal Division.

Table 5.2

Court-authorized orders for interception of wire, oral, or electronic communications

United States, 1968-94

	State	Federal
1968[a]	174	0
1969	268	33
1970	414	182
1971	531	285
1972	649	206
1973	734	130
1974	607	121
1975	502	108
1976	596	137
1977	549	77
1978	499	81
1979	488	87
1980	493	81
1981	483	106
1982	448	130
1983	440	208
1984	512	289
1985	541	243
1986	504	250
1987	437	236
1988	445	283
1989	453	310
1990	548	324
1991	592	356
1992	575	340
1993	596	450
1994	600	554

Note: The Director of the Administrative Office of the United States Courts is required, in accordance with provisions of 18 U.S.C. 2519(1), to transmit to Congress a report regarding applications for orders authorizing or approving the interception of wire, oral, or electronic communications. This report is required to contain information about the number of such orders and any extensions granted. Every State and Federal judge is required to file a written report on each application made. This report is required to contain information on the grants and denials, name of applicant, offense involved, type and location of device, and duration of authorized intercept. Prosecuting officials who have applied for intercept orders are required to file reports containing information on the cost of the intercepts, the number of days the device was in operation, the number of incriminating intercepts recorded, and the results of the intercepts in terms of the number of arrests, trials, convictions, and motions to suppress evidence obtained through the use of intercepts (Source: ***1995***, pp. 1-3). A total of 41 jurisdictions had statutes authorizing the interception of wire, oral, or electronic communications during 1994. Eighteen of these jurisdictions did have court-authorized orders for interception during 1994 (Source: ***1995***, p. 3).

[a]For 1968, the reporting period was from June to December.

Source: Administrative Office of the United States Courts, ***Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1977 to December 31, 1977*** (Washington, DC: Administrative Office of the United States Courts, 1978), p. xiv; Administrative Office of the United States Courts, ***Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications for the Period January 1, 1988 to December 31, 1988***, p. 19; ***Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications for the Period January 1, 1992 to December 31, 1992***, p. 24 (Washington, DC: USGPO); and Administrative Office of the United States Courts, ***Wiretap Report for the Period January 1, 1994 to December 31, 1994*** (Washington, DC: Administrative Office of the United States Courts, 1995), p. 21. Table adapted by SOURCEBOOK staff.

Table 5.3

Court-authorized orders for interception of wire, oral, or electronic communications

By major offense under investigation, 1994

(This table shows the most serious offense for each court-authorized interception.)

Offense	Total	Federal	State
All offenses	1,154	554	600
Narcotics	876	435	441
Racketeering	88	68	20
Gambling	85	8	78
Homicide and assault	19	4	15
Larceny and theft	18	1	17
Kidnaping	11	7	4
Loansharking, usury, and extortion	8	4	4
Bribery	6	1	5
Other	42	26	16

Note: See Note, table 5.2.

Source: Administrative Office of the United States Courts, ***Wiretap Report for the Period January 1, 1994 to December 31, 1994*** (Washington, DC: Administrative Office of the United States Courts, 1995), pp. 12-14.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No.

VINCENT EDWARDS, KARL V. FORT, REYNOLDS A. WINTERSMITH,
HORACE JOINER, AND JOSEPH TIDWELL
Petitioners,

v.

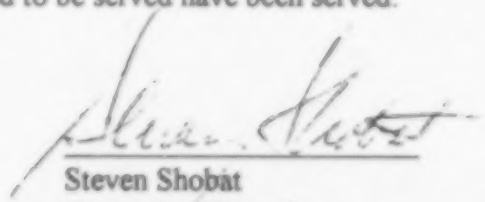
UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing "Petition for a Writ of Certiorari" and "Motion for Leave to Proced In Forma Pauperis" on the United States of America by mailing three copies of each on April 16, 1997 in an envelope properly addressed to:

Solicitor General of the United States
Room 5614
10th & Constitution Avenue, N.W.
Department of Justice
Washington, D.C. 20530

which envelope was deposited in the United States Post Office at Chicago, Illinois, proper first class postage fully prepaid and that all parties required to be served have been served.



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